91-1981

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

M/V TROPICANA, her engines, tackle, apparel, motors, furniture, etc., and GUINNESS MAHON & CO., LTD.,

Petitioners,

—against—

ESPIRITO SANTO BANK OF FLORIDA, f/k/a BANK ESPIRITO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where the plaintiff below has in its possession the proceeds of a letter of credit which was the security substituted for a vessel pursuant to a stipulation between the parties, whether a supersedeas bond is necessary to preserve appellate jurisdiction in a maritime *in rem* case.

2. Where the proceeds of a letter of credit, which was posted as a substitute *res*, were received by a party whose only place of business is within the jurisdiction of the District Court, whether appellate jurisdiction is lost.

3. Where a United States District Court lacks subject matter jurisdiction *ab initio* but grants relief to a plaintiff nonetheless, whether the Court of Appeals and this Court always have jurisdiction to correct the jurisdictional error of the District Court.

LIST OF PARTIES

The parties to this proceeding are the M/V TROPICANA, *in rem*, and Guinness Mahon & Co. Limited, Petitioners, and Espirito Santo Bank of Florida, a Florida banking corporation, Respondent.

Pursuant to Supreme Court Rule 29.1, the following information is provided.

Petitioner Guinness Mahon & Co. Limited is an English banking corporation. The following corporations are its parents:

GMBH
Guinness Mahon Group Limited
Guinness Mahon Holdings plc
Bank of Yokohama

The following corporations are subsidiaries of Guinness Mahon & Co. Limited, excluding wholly owned subsidiaries:

Stowell Investment Limited
Blackbird Securities Limited
Crampton Housing Limited
Pinebrook Limited
Software Resources Limited
Home Mortgages Limited
Huntpast Limited
Peerglow Joint Venture Limited
Southern & District Finance plc
Centaur Properties Limited
Afterfield Limited
Guinness Yokohama Leasing Limited
Metropolitan Mortgage Corporation Limited
Raytitle Limited

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PETITION FOR WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, which is unreported, is reprinted at pages 3-4a of the Appendix. The opinion of the United States District Court for the Southern District of Florida (Marcus, J.), which is unreported, is reprinted at pages 9-20a of the Appendix.

JURISDICTION

Based on an assertion of federal admiralty and maritime jurisdiction, 28 U.S.C. § 1333, Respondent commenced this action on September 13, 1989, in the United States District Court for the Southern District of Florida. Claiming entitlement to a maritime lien based on financial services provided to its owner, charterer and operator, Respondent sought the arrest of M/V TROPICANA (the "Vessel" or "Petitioner"). On May 29, 1990, the district court granted Respondent's motion for final summary judgment (Appendix pp. 9-20a). On January 22, 1991, the district court denied Petitioners' post judgment motions. (Appendix pp. 6-8a).

The United States Court of Appeals for the Eleventh Circuit dismissed the Petitioners' appeal on March 13, 1992 (Appendix pp. 3-4a).

Petitioners' subsequent suggestion for rehearing *en banc* was denied by order dated May 12, 1992 (Appendix pp. 1-2a).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition involves 46 U.S.C. §§ 971-975 and 46 U.S.C. §§ 31341-31343. The texts of those statutes are reprinted at pages 21-24a of the Appendix.

STATEMENT OF THE CASE

On September 13, 1989, Espirito Santo Bank ("ESB" or "Respondent") initiated a maritime *in rem* action against the Vessel, a Bahamian flag ship. ESB alleged in its Complaint that it had a maritime lien on the Vessel for monies loaned to the Vessel's owner, charterer and operator in the amount of $1,088,888.00.

ESB is a Florida banking corporation with its principal place of business in Miami, Florida.

The Vessel was owned by A.N.K. Marine Enterprises Inc. ("A.N.K."), a Liberian corporation, which was one of a number of interrelated corporations directly controlled by Mr. Anastasios N. Kyriakides. Among those interrelated companies were the corporations that chartered and that operated the Vessel.

In the summer of 1988, the Vessel was located at a shipyard in Greece. Extensive work was being conducted at the shipyard in order to convert the Vessel from a cross-channel ferry into a passenger cruise ship. The intent of the Vessel's owner and operator was that after the completion of the conversion in Greece, the Vessel would operate from Miami, Florida.

As part of the conversion, the Vessel's galleys were to be refurbished. The Vessel's operator contracted with an Italian company, Precetti S.p.A. ("Precetti") to do the work at the Greek shipyard for $1,000,000.00. One of the terms of the contract was that payment was to be made to Precetti through an irrevocable letter of credit.

Acting on behalf of the operator of the Vessel, Mr. Kyriakides obtained two letters of credit from ESB to pay Precetti. The monies used to fund the letters of credit, which ultimately totalled $988,000.00, were in the form of loans from ESB to the Vessel's operator. There was nothing in the related loan documents which referred to a maritime lien on the Vessel or could be construed as creating a security interest for ESB in the Vessel. Mr. and Mrs. Kyriakides also executed personal guarantees for the loans. The letters of credit stated that pay-

ments to Precetti would be made upon the completion and approval of the work done in Greece.

On behalf of the same corporation, Mr. Kyriakides also signed a "Revolving Credit Note" with ESB to provide the Vessel's operator with $100,000 of working capital. Similarly, there was nothing in the related loan documents which referred to a maritime lien on the Vessel or could be construed as creating a security interest for ESB in the Vessel. The funds were deposited into the Vessel operator's checking account at ESB on March 2, 1989. At the time of the deposit, the account was overdrawn and ESB's purpose in extending the credit was to cover that overdraft. However, even after the deposit, the checking account remained overdrawn. Before the District Court, ESB later presented six checks out of the many which had been processed through the account. Those checks purported to represent payments to entities which might have had a maritime lien against the Vessel if they had not been paid.

Guinness Mahon & Co. Limited ("Guinness" or "Petitioner") is an English bank, with its principal place of business in London, England. At all relevant times, Guinness was the mortgagee of the Vessel.

In May 1988, Guinness advanced to A.N.K. a loan of $5,000,000.00 to fund part of the cost of the conversion of the Vessel. This loan was secured by a mortgage on the Vessel, duly recorded in the Bahamas. During the conversion in Greece, the actual costs of the work exceeded the estimated costs and Guinness was again approached by Mr. Kyriakides for a further loan to which Guinness agreed. A second loan was therefore made on August 25, 1988 in the amount of $2,000,000.00. This loan also was secured by a mortgage on the Vessel, duly recorded in the Bahamas. No payments were ever made under either mortgage.

In November 1988, the Vessel left Greece and sailed to Miami, Florida. The operations of the Vessel were not financially successful. In an attempt to alleviate the Vessel's situation, Guinness determined to refinance the Vessel, which

occurred in June 1989. A total of $11,750,000.00 was made available in order to provide long-term financing for the Vessel and to pay various creditors listed in an attachment to the attendant Loan Agreements. Mr. Kyriakides, however, did not disclose to Guinness the existence of debts to ESB. The two previous mortgages were satisfied out of the proceeds of the refinancing, and two new mortgages (duly recorded in the Bahamas) were made on the Vessel. The first mortgage (June 22, 1989) secured the sum of $6,000,000.00 and the second mortgage (of the same date) secured the sum of $5,750,000.00. Each of these mortgages recited that it amended, renewed and consolidated the first two mortgages and further advances. No payments were ever made under either of these two mortgages.

Given the number of events of default which occurred subsequent to June 1989, in order to protect its security interest, Guinness elected to take possession of the Vessel itself, which was done by notice to A.N.K. on September 1, 1989.

The Vessel was subsequently sold on behalf of A.N.K. by Guinness to Tropic Cruise Line Limited of the Bahamas. However, in accordance with the terms of the contract of sale, Guinness warranted the Vessel free from arrests or seizures because of prior claims.

After ESB initiated its *in rem* action against the Vessel, Guinness appeared in the action as claimant for the Vessel. Guinness' appearance was restricted properly in accordance with the terms of Fed. R. Civ. P. Supplemental Rule for Certain Admiralty and Maritime Claims E(8).

On October 3, 1989 an Irrevocable Standby Letter of Credit was issued by Midland Bank PLC through Sun Bank, Miami upon the application of Guinness; the beneficiary was ESB. The amount of the Letter of Credit was $1,425,000.00. As required by its terms, in order to be negotiated the Letter of Credit required, *inter alia*, a "certified copy of a final judgment" in the matter. Guinness and ESB then entered into a stipulation and in return for refraining from the arrest of the vessel,

ESB accepted the Letter of Credit issued by Sun Bank for ESB's benefit.

On October 6, 1989, the district court signed an Agreed Order on Motion to Stay Execution of In Rem Process and for Substitution of Stipulated Security or Other Security in Lieu of M/V TROPICANA. The District Court's Order which approved the arrangement between the parties specifically noted that the Standby Letter of Credit was in the possession of ESB.

On October 13, 1989, Petitioners filed a motion which, *inter alia*, moved to dismiss the complaint on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief could be granted. The gravamen of Petitioners' motion was that the financial services provided by ESB did not give rise to a maritime lien against the Vessel and thus the District Court was without jurisdiction in the matter.

However, on May 29, 1990, the District Court signed a Final Order of Summary Judgment, granting Respondent's motion in this regard. Appendix pp. 9-20a. The District Court rejected all of Petitioners' contentions including that ESB did not have a maritime lien because the Italian contractor who did work in Greece and received the proceeds of the letters of credit from ESB could not have an enforceable maritime lien under the Federal Maritime Lien Act ("FMLA"), 46 U.S.C. §§ 31341-31343 (1988 & Supp. I 1989).[1] Similarly, the District Court accepted Respondent's submission of six checks drawn on the Vessel's operator's checking account as proof of a maritime lien, despite Petitioners' contention the funds loaned under the Revolving Credit Note were merely a loan to the Vessel's operator to reduce a seriously overdrawn checking account.

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1 The current codification of the FMLA became effective January 1, 1989. Pub. L. 100-710, title I, § 107, 102 Stat. 4739 (1988). Thus, ESB's claim relating to the letter of credit transactions arose under the prior enactment of the FMLA, 46 U.S.C. §§ 971-975 (1982). Petitioners submit that for purposes of this Petition, none of the changes in the newer enactment should affect the analysis of this case.

On June 11, 1990, Respondent obtained a document captioned "Final Judgment." Thereafter, ESB began to make efforts to negotiate the Standby Letter of Credit. On June 21, 1990, Petitioner submitted its Combined Motions to Alter or Amend Judgment, for Relief from Judgment, to Stay Execution and Issue Injunction, and for Security.

On July 9, 1990 Petitioners filed a Notice of Appeal with the Court of Appeals for the Eleventh Circuit as well as an Emergency Motion for Stay of Execution and Temporary Injunction Pending Disposition of Their Post-Judgment Motions or Appeal and for Suspension of the Rules. ESB moved to dismiss the appeal as premature on July 13, 1990. On July 17, 1990, Petitioners' appeal and request for extraordinary relief were denied by the Court of Appeals.

Thereafter, by July 30, 1990, ESB had obtained $1,300,000.00 from the Standby Letter of Credit. ESB then (on August 1, 1990) filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. On August 9, 1990, Petitioners filed a Motion to Recover Proceeds of Rule E(5)(a) Security Pending Post-Judgment Motions and/or Appeal.

The District Court disposed of all pending motions adversely to Petitioners by its Omnibus Order of January 22, 1991. Appendix pp. 6-8a. The District Court decided that, since the proceeds of the letter of credit were disbursed to satisfy the Final Judgement and there was no supersedeas bond, *in rem* jurisdiction was destroyed because the *res* was no longer before the Court. The District Court found no other basis for jurisdiction.

Petitioners' Notice of Appeal was filed on February 20, 1991. On March 1, 1991, ESB filed in the Court of Appeals a Motion to Dismiss the Appeal, to which Petitioners responded by their submission of March 20, 1991. By a decision filed on August 26, 1991, the Court of Appeals directed that ESB's motion to dismiss be carried with the case. Appendix p. 5a.

On March 13, 1992, a panel of the Court of Appeals rendered its *per curiam* decision in which the appeal was dismissed for

lack of jurisdiction. Appendix pp. 3-4a. In a two sentence opinion, the Court simply cited *Taylor v. Tracor Marine*, 683 F.2d 1361 (11th Cir. 1982) *cert. denied*, 460 U.S. 1012 (1983) and *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988) and concluded it had no jurisdiction over the appeal.[2] In reaching its decision, the Court of Appeals rejected Petitioners' assertion that the absence of a *res* was irrelevant because ESB's claim was never within the maritime jurisdiction of the District Court and a court cannot "lose" jurisdiction that it never had. The court abdicated appellate jurisdiction before it established original jurisdiction. Petitioners' subsequent suggestion for a rehearing *en banc* was rejected. Appendix pp. 1-2a.

REASONS FOR GRANTING THE WRIT

Presently there is a direct and serious conflict among ten of the Circuit Courts of Appeal on the issue of whether the possession or movement of the *res* by a prevailing party in an *in rem* action divests the appellate courts of jurisdiction if no supersedeas bond is posted by an appellant. The Sixth, Seventh and Ninth Circuits adhere to the same rule as the Eleventh Circuit and would deny appellate jurisdiction under those circumstances. Conversely, expressly rejecting the decisions and reasoning of the Eleventh Circuit on the issue, the First, Second, Third, Fourth and Eighth Circuits would find appellate jurisdiction. A court in any of those circuits would have retained jurisdiction in the matter now before this Court.[3]

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2 In an act of logical inconsistency, in the second sentence of its opinion the Court of Appeals opined that if it had jurisdiction it would have affirmed the District Court. This unnecessary *dicta*, presented without discussion or analysis, certainly should be disregarded in the consideration of the significant legal issues presented by the Petition.

3 The Tenth and D.C. Circuits are the only Circuits which have not addressed the issue raised by this Petition. In the Fifth Circuit two panel opinions conflict with each other on the issue.

Moreover, the posting of a supersedeas bond by the losing party is unnecessary in these cases because the prevailing party is in possession of the *res*. The present matter is of national significance because potential appellants are being denied the fundamental right of appellate review simply because their case was heard in a certain circuit and they did not post needless security.

Furthermore, since the *res* in this case never left the Southern District of Florida and the holder of the *res* is subject to the further orders of the District Court, the Court of Appeals failure to exercise full appellate authority clearly was erroneous.

Apart from the above, a fundamental question concerning the relationship between subject matter jurisdiction and appellate jurisdiction mandates review by this Court. The District Court in the present matter committed a fundamental error as it exercised subject matter jurisdiction in a dispute where the District Court was without jurisdiction *ab initio*. The Court of Appeals compounded the District Court's error by failing to correct the unwarranted exercise of jurisdiction by the District Court. The Court of Appeals was in error because that Court, as well as this Court, always has jurisdiction to review the exercise of subject matter jurisdiction by the District Court. Petitioners' submission that the District Court never had subject matter jurisdiction must be reviewed because, if the District Court never had subject matter jurisdiction, then it is impossible for the Court of Appeals to base its decision on a lack of appellate jurisdiction which never existed in the first place and to avoid its duty to review the exercise of jurisdiction by the District Court.

The importance of the resolution of this case by this Court is heightened by this Court's current consideration of *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted sub nom., Republic Nat'l Bank of Miami v. United States*, No.91-767 (October Term, 1991). That case presents substantially similar issues to the present matter and the

Petitioners respectfully suggest that consideration of the petition herein be deferred until after this Court reaches a decision in *Republic Nat'l Bank.*

POINT I

A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON A SIGNIFICANT QUESTION OF LAW

The arrest of the Vessel in the matter now before the Court was based on the *in rem* rules of admiralty, specifically Supplemental Rules for Certain Admiralty and Maritime Claims C and E. On the other hand, the cases referred to above that have produced the split in the circuits are civil forfeiture cases. However, the civil forfeiture cases control the issue raised in the Petition because, by statute and court rule, civil forfeiture proceedings follow the *in rem* rules of admiralty. 21 U.S.C. § 881(b). Additionally, the Court of Appeals *per curiam* decision in the present matter was based in large part on *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988) which itself was a civil forfeiture case.

One Lear Jet dismissed an appeal from a judgement which had forfeited an aircraft to the United States. After prevailing before the district court, the Government flew the aircraft out of the jurisdiction of the district court. The Court of Appeals held that "because removal of the *res* from a court's territorial jurisdiction destroys the court's *in rem* jurisdiction, this Court does not have jurisdiction to hear [the claimant's] appeal." *Id.* at 1573. The majority opinion relied on *in rem* admiralty cases which have held that if the ship leaves the jurisdiction during the case or the substituted *res* is no longer subject to the court's jurisdiction, the court no longer has jurisdiction to proceed. The majority opinion specifically cited *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982), *cert. denied*, 460

U.S. 1012 (1983).[4] That decision is premised ostensibly upon the "long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgement." *Continental Grain Co. v. Barge FBL 585*, 364 U.S. 19, 22-23 (1960).

One Lear Jet was a sharply divided 6 to 5 decision of the Eleventh Circuit sitting *en banc*. Three judges wrote separate dissenting opinions. Judge Clark's dissenting opinion argued that prior admiralty cases and a line of Fifth Circuit authority had relaxed the requirement that appellate jurisdiction depends upon the location of the *res* within the territorial jurisdiction of the Court. *See Continental Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 23 ("A fiction born to provide a convenient forum should not be transferred into a weapon to defeat that purpose."); *Inland Credit Corp. v. M/T BOW EGRET*, 552 F.2d 1148, 1152 (5th Cir. 1977) ("We conclude that it is proper for us to exercise *in personam* jurisdiction to correct any errors in the lower court's *in rem* adjudication."). Judge Clark also expressly rejected the majority's opinion that the claimant should have posted a supersedeas bond to preserve the right to appeal because in other types of proceedings, when a judgement for property is rendered the losing party can bring an appeal and then bring an action to recover his property or its value, if he wins. 836 F.2d at 1584. Judge Edmondson's dissent argued that the court had *in personam* jurisdiction over the case from the moment the government initiated its lawsuit in district court. *Id.*

The most vigorous dissent came from the late Judge Vance. His opinion sharply criticized the majority's analysis: "The majority opinion is disturbing on three different levels. In an important respect it offends fundamental principles of fairness. It also represents a departure from common sense. Finally, it is analytically flawed." *Id.* at 1577. Judge Vance also was critical of the ship personification doctrine which was the basis of

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4 *Taylor* is the other case besides *One Lear Jet* that was cited in the Court of Appeals' two sentence opinion.

the majority's analysis and wrote, "to utilize a defective legal fiction to essentially cut off any right of appeal for appellant is inexcusable." *Id.* at 1577-1578.

Subsequent opinions in several circuits have rejected the majority opinion in *One Lear Jet* and have relied specifically upon Judge Vance's dissenting opinion. The Second Circuit confronted the issue in *United States v. Aiello*, 912 F.2d 4, 6-7 (2d Cir. 1990), *cert. denied*, ____ U.S. ____ (1991) and concluded:

> [T]he dissenters in *One Lear Jet* have the better of the argument. As they point out, the concepts of continuing territorial presence and control in forfeiture actions derive from the admiralty fiction of a ship's personality, a legal construct of dubious validity. With the force of these concepts diminishing in admiralty, they surely ought not to be routinely invoked to deny citizens an opportunity for appellate review of judgements . . .

Similarly, the Fourth Circuit rejected the majority opinion of *One Lear Jet* in *United States v. $95,945.12*, 913 F.2d 1106 (4th Cir. 1990). The court opined that the ship personification rule relied on by the majority in *One Lear Jet* "has been in decline for years, having been weakened by both the Supreme Court and lower courts." *Id.* at 1108.

In *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991), the First Circuit aligned itself with the dissenters in *One Lear Jet*, stating "the time has come to jettison the 'no *res*, no jurisdiction' rule."

The Third Circuit arrived at the same conclusion in a matter involving the forfeiture of currency. In *United States v. $1,322,242.58*, 938 F.2d 433 (3rd Cir. 1991), the court explained:

> [W]e do not think that rules concerning physical location can be applied in any meaningful sense to an incorporeal *res* such as that involved in this case. The *res* at issue here is merely an entry in a Justice Department Account with

> the United States Treasury. In other words, the *res* is an obligation on the part of the Treasury to disburse the specified sum to the Department of Justice. Deeming this obligation to be located at any particular place within the United States would be a complete fiction.

Id. at 437-438.[5]

The most recent treatment of the issue is *United States v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390.00)*, 956 F.2d 801 (8th Cir. 1992). Noting that as the *res* in the matter was a fungible asset, *i.e.*, cash, the court concluded that considerations present in cases where the *res* was a vessel were not compelling. *Id.* at 804.

The dissenters' viewpoint in *One Lear Jet*, however, has not been embraced unanimously by other circuits. In two unpublished decisions, the Sixth Circuit, citing the majority opinion in *One Lear Jet*, dismissed two civil forfeiture appeals where the property has been sold and the proceeds distributed. *United States v. One 1984 Mercedes*, Case No. 90-3674 (6th Cir. March 29, 1991); *United States v. Cadillac Sedan de Ville 1991*, Case No. 90-4054 (6th Cir. May 30, 1991). *See also United States v. $29,959.00*, 931 F.2d 549, 551 (9th Cir. 1991) (jurisdiction in an *in rem* action generally ends with the removal of the *res*); *United States v. Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989) (removal of the *res* divests the court of appellate jurisdiction).[6]

Appellate review is an important fundamental right in all judicial proceedings. In approximately half of the United States, a claimant in federal court can seek review of an *in rem*

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5 Though the *res* in the present matter originally was the Vessel, the letter of credit, as substituted security, transformed the *res* into "incorporeal" currency.

6 Fifth Circuit precedent on the issue is in conflict. *See United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 984 (5th Cir. 1984) (although *res* returned to claimant after verdict, appellate jurisdiction remained); *contra United States v. $79,000 in United States Currency*, 801 F.2d 738 (5th Cir. 1986) (once marshal surrenders custody, if no supersedeas is posted, there is no further jurisdiction).

action where the prevailing party possesses the *res* simply by filing a notice of appeal, while in the other half of the country a claimant must file notice of appeal *and* post a supersedeas bond. For a party to lose its right of appeal because its case was heard in a certain circuit and it did not (or could not) post a bond is both unjust and illogical.

The "ship personification fiction" which the Court of Appeals used to deny jurisdiction in the matter now before this Court (and is used in half the country to deny jurisdiction in similar cases) was designed to broaden jurisdiction, not narrow it. *See Continental Grain Co. v. The FBL-585*, 364 U.S. at 23-24. The fiction was designed to enable a plaintiff to obtain security in "the typical case where the defendant ship stealthily absconds from port to port and leaves the plaintiff with no *res* from which to collect." *United States v. $95,945.12*, 913 F.2d at 1109. In a case where the claimant has lost and the prevailing party is in possession of the *res*, the prevailing party does not need security from which to collect a judgement. Since no security is required, there is no rational reason to apply the "ship personification fiction" to frustrate an appeal. As this Court stated in *Continental Grain*, "A fiction born to provide convenient forums should not be transferred into a weapon to defeat that very purpose." 364 U.S. at 23.[7]

In summary, virtually all of the circuits have issued opinions on this important issue of appellate jurisdiction, and the circuits are divided almost equally. Therefore, the division among the

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7 Other types of jurisdictional defects that occur after the commencement of a lawsuit do not defeat appellate jurisdiction. *See, e.g., St. Paul Mercury Indemn. Co. v. Red Cab Co.*, 303 U.S. 283, 289-290 (1938) ("Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."); *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 353 (1913) ("If a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause."). If none of those reasonably compelling factors defeats appellate jurisdiction, there is no justification for allowing the absence of completely unnecessary security to defeat appellate jurisdiction in the present matter.

circuits is fully developed and ripe for adjudication and can be resolved only by this Court.[8]

POINT II

EVEN UNDER *ONE LEAR JET* AND ITS PROGENY APPELLATE JURISDICTION WAS NOT LOST BECAUSE THE *RES* REMAINED WITHIN THE JURISDICTION OF THE DISTRICT COURT

Even assuming the majority opinion in *One Lear Jet* was correctly decided, the Court of Appeals committed error in not applying its own precedent to determine the matter now before this Court. The *per curiam* decision implicitly rests upon the ground that, as Respondent had received the proceeds of the letter of credit provided to it by Guinness as security, the Court of Appeals and this Court are now completely deprived of the ability to review the matter.

The decision of the Court of Appeals is not supported by its own governing precedents. A full review of the record will reflect that, as the *res* is still present in the Southern District of Florida and the holder of the *res* is subject to the further orders of the District Court, it was clear error not to exercise full appellate authority.

At the threshold, it should be noted the present matter is not a situation where the *res* has been removed indisputably from the jurisdiction, such as the airplane in *One Lear Jet*. Nor is the present matter a case where an incorporeal *res*, such as a sum of money, has been transferred outside the jurisdiction. *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 932 F.2d 1433, 1434 (11th Cir. 1991), *cert.*

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8 On February 24, 1992, this Court issued a writ of certiorari in *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted sub nom., Republic Nat'l Bank of Miami v. United States*, No. 91-767 (October Term, 1991). As the issues arising in that case are closely analogous to the issues in the Petition herein, as an alternative to an immediate grant of the writ of certiorari, Petitioners will also move for a stay herein of the Court's decision pending its decision in *Republic Nat'l Bank*.

granted sub nom., Republic Nat'l Bank of Miami v. United States, No. 91-767 (October Term, 1991). Neither is the instant dispute a case where the *res*, such as a house, has been sold for value to a third party not involved in the case. *United States v. Certain Real and Personal Property*, 943 F.2d 1292, 1294 (11th Cir. 1991). In the latter case, the court recognized the specific circumstances that provide the court with appellate jurisdiction over *in rem* cases:

> In *United States v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991) (en banc), a panel of this Court concluded that it had jurisdiction to hear the Government's appeal from a grant of summary judgment to a claimant even though the dozer in question had been released to the claimant, a party to the appeal. In that case, the property not only remained within the territorial bounds of the court but had been released to the claimant, who was a party before the court, on the condition that he would 'keep the property within the territorial jurisdiction of the court.' Thus, *the* res *remained in the hands of one of the litigants and had not been sold or released to a stranger to the litigation*.

Id. at 1295 (emphasis supplied).

The matter now before this Court falls within the parameters of the doctrine as outlined by the Eleventh Circuit in *Four Parcels of Real Property*. Respondent cannot deny that it is a Florida corporation with its principal place of business in Miami, Florida. Moreover, Respondent cannot deny that itself, and not the District Court, held the Letter of Credit during the pendency of the action and that it received the proceeds of the Letter of Credit. Thus, Respondent cannot deny that as a party to the action, present in the jurisdiction, it still holds the *res* as part of its assets.

In its *per curiam* opinion, the Court of Appeals made no attempt to distinguish its decision in *United States v. One (1) 1983 Homemade Vessel Named "BARRACUDA"*, 858 F.2d 643 (11th Cir. 1988), a precedent analogous to the present matter.

In that case, the District Court ordered a vessel forfeited and federal and state authorities loaded her with five thousand pounds of cement and sent her to the bottom of Biscayne Bay. There was no doubt that such action effectively destroyed the *res*. Nonetheless, the court succinctly held that it had jurisdiction:

> That [the claimant] would be able to salvage little, if anything, from the BARRACUDA is of no moment. We believe that once *in rem* jurisdiction has attached, it is not defeated solely because a physical change occurs in the *res*. In sum we have the power to decide this controversy.

Id. at 647 (footnote omitted).

The same succinct reasoning applies herein, since although the *res* may have changed in the "physical" sense from a letter of credit to an entry on ESB's ledgers, it remains within the jurisdiction in the hands of ESB.

Furthermore, at no time was the Letter of Credit provided to ESB by Guinness or the proceeds from the Letter of Credit deposited in the registry of the District Court, hence citation to *Taylor v. Tracor Marine* is inapposite to the determination of the present dispute. In the present matter, before the District Court was a stipulation wherein Guinness confirmed the issuance of the Letter of Credit and that it would appear on behalf of the Vessel. The letter of credit was delivered to ESB. That stipulation alone may be deemed sufficient to confer appellate jurisdiction upon this Court.[9]

In summary, the letter of credit funded by Guinness, like the check or wire transfer drawn against it, represents an *incor-*

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9 In fact, the stipulation between Petitioner and Respondent provides another, independent ground of appellate jurisdiction. Where a stipulation has been entered into between the parties in an *in rem* action, its existence alone is sufficient to confer jurisdiction upon the court. *See Panaconti Shipping Co., S.A. v. M/V YPAPANTI*, 865 F.2d 705, 707 (5th Cir. 1989) (a stipulation adequately serves the purpose of a letter of undertaking, which is sufficient to perfect *in rem* jurisdiction in the absence of the arrest of the vessel). Additionally, once the stipulation is before the court, the court has jurisdiction to order the modification of the stipulation as required to protect the rights of the parties. *See The VIRGO*, 28 F. Cas. 1233, 1233 (E.D.N.Y. 1876) (No. 16,976).

poreal res, whose existence now is merely an entry on ESB's ledgers, a bank which is located solely within the jurisdiction of the U.S. District Court for the Southern District of Florida. To argue that payment having been made under the letter of credit somehow has destroyed or moved the *res* or to imagine the *incorporeal res* exists in some other jurisdiction belies logic and common sense. As the *res* remains within the jurisdiction, even under the most draconian application of the majority's doctrine in *One Lear Jet*, the Court of Appeals below was in error in failing to exercise its appellate jurisdiction and provide a full and fair review of the District Court's decision. Indeed, its decision is an unwarranted extension of an already dubious rationale.

POINT III

THE COURT OF APPEALS AND THIS COURT ALWAYS HAVE JURISDICTION TO REVIEW THE EXERCISE OF SUBJECT MATTER JURISDICTION BY THE DISTRICT COURT

The Court of Appeals not only erred in not fully reviewing the matter, it also failed to exercise its jurisdiction in the most fundamental fashion. Petitioner submits that the District Court *never* had subject matter jurisdiction. Nonetheless, the District Court entered judgment for Respondent. Since the District Court was without jurisdiction *ab initio* it follows that there never was appellate jurisdiction to be "lost", as one cannot lose what one never had. However, as part of their inherent jurisdiction and power, the Court of Appeals and this Court have the authority to exercise jurisdiction to correct the fundamental jurisdictional error of the District Court.

In order to examine the issue, a review of the jurisdictional aspects of Respondent's claim of a maritime lien against the Vessel is required. ESB's complaint was grounded on its supposed entitlement to a maritime lien against the Vessel pursuant to the FMLA. However, if the subject matter of the contracts upon which ESB relies are not within the admiralty jurisdiction, there can be no maritime lien.

There are at least three, independent grounds upon which Respondent's claim of maritime liens against the Vessel should be rejected. First, as the contracts between ESB and its customer do not fulfill the prerequisites of a maritime contract any action related to those contracts is not within the maritime jurisdiction. Second, to the extent the contracts involved maritime commerce, the contracts were of a preliminary nature and actions arising from the breach of those contracts are not within the maritime jurisdiction. Third, as the money loaned by ESB to its customer does not meet the requirements of the venerable admiralty doctrine of advances, Respondent possesses no maritime lien.

Essentially, the boundaries of maritime contract jurisdiction are "conceptual rather than spatial . . ." *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961). Although a contract may be related to a vessel and its operations, that does not create an automatic maritime lien if the contract is breached. If the contract is in fact non-maritime, there is no admiralty subject matter jurisdiction. *See, e.g., Fednav, Ltd. v. Isoramar, S.A.*, 925 F.2d 599 (2d Cir. 1991) (alleged agreement whereby shipowner agreed to contribute to charterer's settlement of cargo damage claim was not a maritime contract, hence case was dismissed for lack of subject matter jurisdiction).

To determine the maritime nature of a contract a careful analysis of the contract itself is required:

> For jurisdictional purposes, admiralty law has long viewed the nature and subject matter of a contract as controlling . . . And to serve as the basis of a suit in admiralty, the contract must be 'purely' or 'wholly' maritime . . .

Alaska Barge and Transp., Inc. v. United States, 373 F.2d 967, 970 (Ct. Cl. 1967) (citations omitted).

When the relevant precedent is applied to the facts of the present matter, it must be concluded that the contracts between ESB and Mr. Kyriakides and his company were not primarily maritime in nature. The services provided by ESB were routine

financial services customarily provided by banks to their customers.[10] ESB's banking services consisted of arranging and transmitting letters of credit to a foreign beneficiary, which in itself is hardly a maritime transaction. Similarly, the loan to fund the letters of credit, another routine banking transaction, is not in and of itself a maritime event. Nor is the Revolving Credit Agreement, whereby the bank sought to decrease its customer's already overdrawn checking account, a matter directly relating to maritime commerce. Finally, to the extent that there may be maritime aspects to those transactions, it is impossible to sever them from the other non-maritime aspects. In summary, the disputes between a bank and its customer over loan transactions should not be adjudicated under the guise of a federal maritime action, but instead in the proper forum for such disputes—a Florida state court.

By bringing a uniquely maritime cause of action, ESB claimed that its loan agreements with its customer were within the ambit of the District Court's admiralty jurisdiction. Although the contracts tangentially may involve maritime commerce, the actual services provided by ESB are not within the admiralty jurisdiction as the maritime services provided by ESB were of a mere preliminary nature.

It is clear that not every service provided by a party which may involve a vessel is subject to adjudication in an admiralty forum. Denial of admiralty jurisdiction is inherently logical when the services provided are not directly related to the navigation or management of the vessel:

> The distinction between preliminary services leading to a maritime contract and such contracts themselves have

10 Until passage of the Ship Mortgage Act in 1920 (currently codified at 46 U.S.C. §§ 31321-31330 (1988 & Supp. I 1989)) even an action based on the actual mortgage of the vessel was considered to be outside admiralty jurisdiction. *See National Business Sys., Inc. v. Borg-Warner Acceptance Corp.*, 792 F.2d 710 (8th Cir. 1986). While that Act of Congress created a maritime lien for the "preferred ship mortgage", the need for such an act highlights the fact that loans made to a ship owner which are not secured by a mortgage on a vessel are most certainly not cognizable in admiralty. *See also Savas v. S/S CAPT. JOHN C.*, 182 F. Supp. 641, 643 (E.D. Va. 1960) (loan to owner of vessel did not create maritime lien).

> been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce.

The THAMES, 10 F. 848, 848 (S.D.N.Y. 1881).

The Eleventh Circuit itself delineated the contours of the preliminary contract doctrine in *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, 815 F.2d 660 (11th Cir. 1987). In *Binnings*, a vessel's general agent asserted a maritime lien against the vessel for the amount of commissions due for cargo manifested on the vessel. After trial, the District Court entered judgment for the agent. The court reversed the judgment and ordered the case dismissed as there was no subject matter jurisdiction.

The validity of the preliminary contract doctrine was recognized:

> The reason for excluding [agency] contracts is the distinction long recognized in admiralty between contracts that involve preliminary services leading to maritime contracts and those that are themselves maritime . . . Although contracts for performance of preliminary services 'relate to the business of the ship, they are essentially no different from services ordinarily performed by other shoreside persons who are not involved in the operation or navigation of the ship,' and, therefore, are not maritime in nature.

Id. at 663 (quoting *Outbound Maritime Corp. v. P.T. Indonesian Consortium of Constr. Ind.*, 582 F. Supp. 1136, 1141 (D. Md. 1984)). After reviewing in detail the specific types of services provided by the agent (which included financial services), the court concluded that "All these services clearly are shoreside and all have been held to be outside the admiralty jurisdiction." *Id.* at 664 (citation omitted).[11]

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11 The contract which was the subject in *Binnings* was a general agency contract. That type of contract has been addressed in a recent decision by this

The continuing validity of the preliminary contract doctrine has been recognized in other recent federal decisions. For example, in *Planned Premium Serv. of Louisiana, Inc. v. International Ins. Agents*, 928 F.2d 164, 165 (5th Cir. 1991), the only issue on appeal was whether a contract to finance maritime insurance was within the admiralty jurisdiction. The Court held that such a contract was not within the maritime jurisdiction:

> Preliminary contracts typically relate to maritime affairs in that the services provided often are necessary for operation of ships and other concerns of the shipping industry . . . These services, however, are often identical to or essentially similar to non-maritime services regularly performed by those not involved in the operation of vessels . . .
>
> . . . .
>
> [W]e conclude that a financing contract preliminary to obtaining maritime insurance is not within the admiralty jurisdiction. Today we so hold.

Id. at 166-67 (citations omitted). Furthermore, in *Carter-Green-Redd, Inc. v. USS CABOT/DEDALO Museum Found.*, 756 F. Supp. 276 (E.D. La. 1991), the court held that an option contract to lease a vessel is not within the maritime jurisdiction as its relationship to issues involving maritime commerce was remote or preliminary, at best: "[T]he contract is one which was made on land to be performed on land, and there is no need or justification for resort to the law of the sea." *Id.* at 278.

Court. In *Exxon Corp. v. Central Gulf Lines, Inc.*, ____ U.S. ____, 114 L. Ed. 2d 649 (1991), the Court held that a general agency contract is not *per se* excluded from the admiralty jurisdiction. It is important to note that this Court did not rule that a general agency contract was subject to admiralty jurisdiction, merely that such a contract was not automatically excluded from such jurisdiction. *Id.* 114 L.Ed.2d at 658. Moreover, although this Court noted that part of the decision in the District Court was founded on the preliminary contract doctrine, the Court expressly noted it had never ruled on the doctrine nor was the issue reached in the case before it. *Id.* 114 L.Ed.2d at 659 n. 7.

If the analytical method applied in the above-cited precedent is applied to the case now before this Court, the result should be a finding that ESB's contracts with Mr. Kyriakides and his company represent a classic example of contracts which at best are only preliminary to *other* maritime contracts and thus not within the District Court's admiralty jurisdiction.

ESB was not involved in any maritime contract, as any truly maritime service provided to the Vessel always involved entities separate and distinct from ESB. Precetti's contract to provide goods and services to the Vessel was a maritime contract, but ESB was not a party to that contract. Of the checks selectively produced by ESB, some were to parties who ostensibly had performed maritime services, but ESB was in no way involved in the performance of those services. Instead, ESB's contracts with Mr. Kyriakides and his company were for the provision of letters of credit and a revolving credit agreement. Those contracts were at least "one step" removed from the provision of maritime services. As such, ESB's claim of admiralty jurisdiction was incorrect from the inception of the matter.

If the subject matter of the contracts upon which ESB relies are not within the admiralty jurisdiction, there can be no maritime lien as "[A] prerequisite to the existence of a maritime lien based on breach of a contract for services is that the subject matter of the contract must fall within the admiralty jurisdiction." *Binnings*, 815 F.2d at 666. As Respondent's contracts do not meet the required prerequisites for an enforceable maritime contract, as a matter of law there can be no maritime lien in the present matter.

In order to claim a maritime lien, Respondent also relied upon the venerable admiralty doctrine of advances. The doctrine of advances has been long recognized in admiralty: "An advance is validly made when monies are paid to the vessel owner or his agent to be used to satisfy a third party lienholder's claim against the ship." Tetley, *Assignment and Transfer of Maritime Liens: is There Subrogation of the Privilege?*, 15 J. Mar. L. & Com. 393, 411 (1984). It essentially

is a doctrine of subrogation. *See International Paint Co. v. M/V MISSION VIKING*, 637 F.2d 382, 385 (5th Cir. Unit B Feb. 1981) (one who advances money to pay crew wages entitled to maritime lien of same rank).

Thus, to analyze ESB's claim of entitlement to a maritime lien, the underlying transactions must be examined in order to determine what, if any, liens ESB obtained by way of subrogation from the actual providers of goods and services to the Vessel.

The District Court below concluded that U.S. law applied to this matter and that, under U.S. law, ESB was entitled to a maritime lien on the Vessel, on the basis of the funds loaned to its customer to fund the letters of credit which were for the benefit of Precetti. The District Court's view misapprehended the legal theory involved in this matter. While recognizing the doctrine of advances, the District Court did not complete the required analysis. It is not merely a question of the application of U.S. or Greek law: instead, the analysis stems from the doctrine of advances, *i.e.*, if Precetti had not been paid for the work it performed on the Vessel, would Precetti be able to enforce a maritime lien (under the FMLA) against the Vessel in the District Court? As a mere subrogee, ESB can be in no better position than the party whose lien it purportedly discharged.

In considering the enforcement of a maritime lien sought by a non-U.S. plaintiff (such as Precetti), courts traditionally looked strictly to the law of the place where the goods or services were supplied or performed. *See, e.g., The CITY OF ATLANTA*, 17 F.2d 308, 309 (S.D. Ga. 1924) (where goods were supplied in Havana by Cuban corporation to a U.S. vessel, Cuban law governed the creation of the lien and its enforcement).

More recent decisions have applied a more complicated choice of law analysis to the issue relying heavily on the facts in question, nevertheless, the nationality of the supplier and the place of supply are still crucial elements in the determination. *See Swedish Telecom Radio v. M/V DISCOVERY I*, 712 F. Supp. 1542, 1548 (S.D. Fla. 1989). In that case, after determining the

law to be applied was Swedish (which was the nationality of the supplier and the law specified in the contract), the court dismissed the action as it found the lienor had no *in rem* right of action under Swedish law. *Id.* at 1546.

The record of this case establishes that Precetti, an Italian company, provided goods and services to the Vessel (a Bahamian flag ship) in Greece. Thus, under the traditional analysis the law of Greece should be examined as to the creation of a maritime lien. Furthermore, when the modern choice of law principles are applied, from Precetti's perspective, the result will be the same. As was established in the record in this case, Precetti has no lien under Greek or U.S. law.[12] If Precetti had no lien, neither did its subrogee, ESB.

Respondent also claimed an entitlement to a maritime lien based upon its loan of $100,000.00 under the Revolving Credit Agreement to its customer. To support the claim, ESB submitted to the District Court six checks from the Vessel's operator's account which allegedly related to lienable items. Fundamental to the establishment of a maritime lien is the requirement that the plaintiff prove the funds advanced specifically were used to satisfy an outstanding lien claim. *See Inland Credit Corp. v. M/T BOW EGRET*, 552 F.2d 1148, 1153 (5th Cir. 1977) (where loan funds deposited in bank account, it was impossible to determine which funds paid maritime lienable items). Before the District Court, Respondent selectively produced a few checks and claimed those checks entitled it to maritime lien on the Vessel for the full amount loaned under the Revolving Credit Agreement. There was no evidence that the funds loaned to Mr. Kyriakides and his company *actually* were used to discharge those debts. Furthermore, the absence of any restriction in the Revolving Credit Agreement itself is a telling indicator that the funds were merely a general loan to the

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12 *See also Metron Communications, Inc. v. M/V TROPICANA*, No. 89-2460-CIV-ARONOVITZ (S.D. Fla. Mar. 5, 1992) (Neither U.S. nor Greek law recognizes a lien for goods and services provided by Danish suppliers to M/V TROPICANA during the conversion in Greece).

bank's customer as opposed to a specific loan to extinguish lienable debts of the Vessel.[13]

In summary, based upon the foregoing it is clear that the District Court was without subject matter jurisdiction *ab initio*. Nonetheless, the District Court rejected Petitioners' motion to dismiss on that basis and instead gave judgment to Respondent and Respondent recovered on that judgment. Under those circumstances the District Court's lack of subject matter jurisdiction was and is a proper and necessary subject for review by the Court of Appeals and this Court.

It is a fundamental and longstanding canon of federal jurisprudence that:

> [L]ack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of the lower courts in a cause under review.

Mitchell v. Maurer, 293 U.S. 237, 244 (1934) (citation omitted). The early case of *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804) illustrates this Court's determination that subject matter jurisdiction is a core concern which mandates a review of a lower court's exercise of its jurisdiction. In *Capron*, this Court declared that "it was the duty of the court to see that they had jurisdiction, for the consent of parties could not give it." *Id.*

As was established by this Court in *Capron*, the issue of subject matter jurisdiction is at the very root of the federal judicial system:

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13 Petitioner also notes that an additional substantive defense was rejected by the District Court and not reviewed by the Court of Appeals. The record before the District Court reflected that a sophisticated financial institution, ESB, entered into a variety of transactions with a customer, Mr. Kyriakides, whom the bank desired to cultivate. Even after that relationship had soured, well after all the loans had been made, ESB still did not contemplate the Vessel itself as a source of security for or repayment of its loans nor did any of the relevant loan documents at all indicate that ESB contemplated the Vessel *in rem* as security for the loans. As such, ESB did not rely on the credit of the Vessel in making the loans, which is a complete affirmative defense to a maritime lien. *See Equilease Corp. v. M/V SAMPSON*,

> 'And if the record disclosed that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' *United States v. Corrick*, 298 U.S. 435, 440 (1936) (footnotes omitted).

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (other citations and footnote omitted). Underlying this core concern is the principle that a federal court may not extend its federal jurisdiction beyond its constitutional and statutory limits and, if a court does extend itself beyond those limits, that decision is subject to *de novo* review before an appellate court.

As the District Court had committed a grave and fundamental jurisdictional error, the Court of Appeals was obliged, under any circumstances, to render a *de novo* review of the exercise of jurisdiction by a lower court. *Bender*, 475 U.S. at 541.

This Court has had occasion to address the issue of what an appellate court must do when it determines that there is no jurisdiction over the dispute, but the judgment in the court below was for the plaintiff:

> Where both the Circuit Court and this court are without jurisdiction it is in general irregular to make any order or decree in the case, except to dismiss the suit, but that rule does not apply to a case where the Circuit Court rendered a judgment or decree in favor of the party instituting the suit, but in such a case the court here will reverse the judgment or decree in the court below, and remand the cause with directions to dismiss the suit.

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793 F.2d 598, 606 n.8 (5th Cir.), *cert. denied*, 479 U.S. 984 (1986) (where the credit of the vessel "was not considered in the slightest" there was no maritime lien).

> Where the court below has no jurisdiction of the case in *any form* of proceeding, the regular course, if the judgment or decree is for the defendant or respondent, is to direct the cause to be dismissed, but if the judgment or decree is for the plaintiff or petitioner, as in this case, the court here will reverse the judgment or decree and remand the cause with proper directions, which in the case supposed must be to dismiss the writ, libel, or petition, as the subordinate court cannot properly hear and determine the matter in controversy.

Stickney v. Wilt, 90 U.S. (23 Wall.) 150, 162, 163-64 (1874) (emphasis in original) (footnote omitted). *See also United States v. Corrick*, 298 U.S. 435, 440 (1936) ("[When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."); *Mail Co. v. Flanders*, 79 U.S. (12 Wall.) 130, 135 (1870) (the rule concerning dismissal of appeals for want of jurisdiction does not apply to preclude the setting aside of such orders as were made before the lack of jurisdiction was discovered); *Ligurotis v. Whyte*, 951 F.2d 818, 819 n.1 (7th Cir. 1992) ("We certainly possess jurisdiction to determine whether the district court correctly held that it was without jurisdiction.").

Petitioners submit that the errors in exercise of subject matter jurisdiction committed by the District Court and the Court of Appeals are fundamental and necessitate the full review of this Court. Moreover, Petitioners submit that the question of the exercise of appellate jurisdiction in the circumstances of the matter are of seminal national importance as, to allow the Court of Appeals' decision to stand, would countenance the abrogation of the duty of Courts of Appeal to supervise properly the exercise of subject matter jurisdiction by the District Courts.

POINT IV

THE IMPORTANCE OF THIS CASE IS FURTHER AUGMENTED BECAUSE IT PRESENTS THE SAME ISSUE AS *REPUBLIC NAT'L BANK OF MIAMI V. UNITED STATES*, NO. 91-767, WHICH IS PRESENTLY PENDING BEFORE THIS COURT. THEREFORE, THE PETITIONERS RESPECTFULLY SUGGEST THAT CONSIDERATION OF THIS PETITION BE DEFERRED UNTIL THE RENDITION OF AN OPINION IN THAT CASE.

On February 24, 1992, this Court issued a writ of certiorari to review the judgement and opinion of the United States Court of Appeals for the Eleventh Circuit in *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted sub nom., Republic Nat'l Bank of Miami v. United States*, No. 91-767 (October Term, 1991). The question presented for review upon which this Court granted the writ of certiorari in *Republic Nat'l Bank* was— "Whether a stay or supersedeas bond is necessary to preserve appellate jurisdiction in a civil forfeiture case?" The present matter poses substantially the same question.

Since the seizure of property in *Republic Nat'l Bank* was governed by the Supplemental Rules for Certain Admiralty and Maritime Claims, *see* 21 U.S.C. § 881(b), and the arrest of the Vessel in the present matter was made under those same rules, the *in rem* actions in both cases are functionally the same. Appellate jurisdiction also was denied by the Eleventh Circuit in both cases, because the losing party did not post a supersedeas bond.

If this Court stays the decision in this Petition until after the decision in *Republic Nat'l Bank* and in that case the ruling is for the Petitioner, it would then be possible to grant the writ of certiorari in the present matter and in a summary disposition remand the dispute to the Court of Appeals. However, if *Republic Nat'l Bank* were to be decided adversely to the

Petitioner therein, the writ of certiorari in the present matter nonetheless still should be granted on the other independent grounds asserted by Petitioner herein.

There are numerous instances where this Court has deferred action on a writ of certiorari pending the outcome of a case raising identical or similar issues. For example, the petition for a writ of certiorari in *Central States Coop., Inc., v. Watson Bros. Transp. Co.*, 337 U.S. 951 (1948), was held for the decision in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1948). Similarly, the petitions for a writ of certiorari in *Trustees of the Monroe Church v. Perkins*, 334 U.S. 813 (1947), and *Amer v. Superior Court*, 334 U.S. 813 (1947), were held for the decision in *Shelley v. Kraemer*, 334 U.S. 1 (1947). The decisions in *Monroe Church* and *Amer* ultimately were reversed as a result of the *Shelley* decision. Finally, in *Keney v. New York*, 388 U.S. 440 (1967), the petition for a writ of certiorari was held nearly two and a half years until decisions were rendered in other similar cases pending before this Court.

In view of the foregoing, Petitioners respectfully request that the Court postpone its consideration of this petition for certiorari pending the Court's final decision in *Republic Nat'l Bank*.[14]

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14 To the extent that such a request may be made by motion before this Court, Petitioners respectfully request that this part of the petition for a writ of certiorari be considered a motion submitted to the Court in accordance with U.S. Sup. Ct. R. 21.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the United States Circuit Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Of Counsel:

JAMES H. HOHENSTEIN
ROBERT LAMAR BELL

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5142

Filed May 12, 1992

ESPIRITO SANTO BANK OF FLORIDA,
f/k/a Bank Espirito,

Plaintiff-Appellee,

versus

M/V TROPICANA, her engines, tackle, apparel,
motors, furniture, etc.,

Defendant-Appellant,

GUINNESS MAHON & CO., LTD.,

Claimant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before:

FAY, *Circuit Judge,*
DYER and CLARK*, *Senior Circuit Judges.*

* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ PETER FAY
UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5142

Filed Mar. 13, 1992

D.C. Docket No. 89-1939-Civ-SM

ESPIRITO SANTO BANK OF FLORIDA,
f/k/a Bank Espirito,

Plaintiff-Appellee,

versus

M/V TROPICANA, her engines, tackle, apparel,
motors, furniture, etc.,

Defendant-Appellant,

GUINNESS MAHON & CO., LTD.,

Claimant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

Before:

FAY, *Circuit Judge,*
DYER and CLARK*, *Senior Circuit Judges.*

* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

PER CURIAM:

The appeal is dismissed for lack of jurisdiction. *Taylor v. Tracor Marine*, 683 F.2d 1361 (11th Cir. 1982) and *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir. 1988). If we had jurisdiction, we would affirm the judgment pursuant to our Local Rule 36-1.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5142

Filed August 26, 1991

ESPIRITO SANTO BANK OF FLORIDA,
f/k/a Bank Espirito,
Plaintiff-Appellee,

versus

M/V TROPICANA, her engines, tackle, apparel,
motors, furniture, etc.,
Defendant-Appellant,

GUINNESS MAHON & CO., LTD.,
Claimant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

Before:

TJOFLAT, *Chief Judge*,
BIRCH and DUBINA, *Circuit Judges*.

BY THE COURT:

Appellee's motion to dismiss the appeal is CARRIED WITH THE CASE. The parties may, but are not required to, further address in their briefs the issues raised by the motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-1939-CIV-MARCUS

Filed Jan. 22, 1991

ESPIRITO SANTO BANK OF FLORIDA,
a Florida banking corporation,

Plaintiff,

vs.

M/V TROPICANA, her engines, tackle, apparel,
motors, furniture, etc.,

Defendant.

OMNIBUS ORDER

THIS CAUSE comes before the Court upon Defendants' Motion to Alter or Amend Judgment filed June 8, 1990; Defendant's Combined Motions to Alter or Amend Judgment, for Relief from Judgment, to Stay Execution and Issue Injunction, and for Security filed June 21, 1990, which amends and supplements Defendants' earlier motion; Plaintiff's Motion to Impose Sanctions; Plaintiff's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and Claimant/Defendant's Motion to Recover Proceeds of Rule E(5)(a) Security Pending Post-Judgment Motions.

Defendant and Claimant ("Defendants") seek an order altering or amending our Final Order of Summary Judgment entered in favor of Plaintiff on May 29, 1990. Defendants also seek to stay execution of the final judgment and to issue injunction pending the disposition of post-judgment motions and proceedings or appeal pursuant to Rule 62 of the Federal Rules of Civil Procedure.

As embodied in our Final Order of Summary Judgment, we found that Plaintiff's claims against Defendant vessel constituted a maritime lien with priority over Claimant's foreign preferred ship's mortgage. After careful review and due consideration, we find no basis in Defendants' Motions to modify our previous Order of Summary Judgment. We note that in their motions Defendants do not support their position with any new legal authority or citations. Defendants summarily refer to the authority and arguments cited in their previous pleadings and restate contentions and arguments previously considered and decided by this court on the Motion for Summary Judgment.

Furthermore, in their motion, Defendants once again contend that their opposition to Plaintiff's Motion for Summary Judgment was not untimely and that Defendants disputed all of the facts contained in Plaintiff's statement of material facts. It was only at the status conference before this court on April 24, 1990—three months after Plaintiff's Motion for Summary Judgment was filed—that Defendants submitted their Objections to Plaintiff's statement of undisputed material facts. At the status conference we noted in no ambiguous terms the untimeliness of Defendants' submissions. Nonetheless, despite Defendants' counsel's inability to produce any justification, we proceeded to consider Defendants' untimely submissions. In addition, we explicitly questioned Defendants' counsel: "In terms of discovery are you done and ready to go?" Defendants' counsel responded unequivocally: "Yes, sir, we are ready." Transcript of Status Conference April 24, 1990 at p. 19. (See also Transcript of Status Conference February 12, 1990, at p. 3). Also, we re-iterate that on a motion for summary judgment a general denial of the moving party's statement of material facts is not sufficient. *See* Local Rule 10(J)(2). In our Order of Summary Judgment we stated that Claimant failed to squarely dispute any material fact. We can find no merit to Defendants' argument.

Additionally, we note that Defendants have not filed a supersedeas bond as required by Rule 62(d) of the Federal Rules of Civil Procedure in order to stay execution of the judgment. Defendant and Claimant have not satisfactorily

shown, nor do we find, any other basis to stay execution of the judgment. Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion to Alter or Amend Judgment and Defendants' Combined Motions to Alter or Amend Judgment, for Relief from Judgment, to Stay Execution and Issue Injunction, and for Security are DENIED.

Plaintiff's Motion for Sanctions is DENIED.

All other pending motions are DENIED as moot. The Court entered Final Judgment on June 11, 1990, and pursuant to the Court's Order of October 6, 1989, Defendant and Claimant had furnished Irrevocable Standby Letter of Credit No. CC-40051 issued by Sun Bank/Miami N.A. Since Sun Bank/Miami N.A. disbursed the proceeds of said letter of credit to satisfy the Final Judgment, this Court no longer retains *in rem* jurisdiction under 28 U.S.C. § 1333. The Court has no other basis of jurisdiction *sub judice*. *See Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012, 103 S.Ct. 1252 (1983). ("A trial court's in rem jurisdiction in a case such as this may be furnished by a vessel, the proceeds of the judicial sale of the vessel, or security furnished in lieu thereof . . . . However, when the res is no longer before the court, its in rem jurisdiction is destroyed, and any appeal from its decision is rendered moot) (citations omitted).

DONE AND ORDERED at Miami, Florida, this 22nd day of January, 1991.

/s/ STANLEY MARCUS
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-1939-CIV-MARCUS

Filed May 29, 1990

ESPIRITO SANTO BANK OF FLORIDA,
a Florida banking corporation,

Plaintiff,

vs.

M/V TROPICANA, her engines, tackle, apparel,
motors, furniture, etc., in rem,

Defendant.

FINAL ORDER OF SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon Plaintiff's Motion for Summary Judgment, filed January 26, 1990. Plaintiff seeks final summary judgment on the basis of its Complaint, foreclosing an alleged maritime lien on Defendant vessel and awarding Plaintiff the sums demanded. Plaintiff's Complaint alleges a default by Defendant vessel on amounts advanced for the purpose of marine necessaries in the total amount of $1,088,888.00.

I. *Factual Background*

As part of refurbishing the Defendant vessel in order to operate a one-day cruise service between Miami and Bimini, Sea Venture Cruises, Inc., agent for the vessel's charterer, Sea Venture Maritime, S.A., executed an Agreement with

Precetti, S.P.A., for the manufacture and installation of galleys and appurtenant equipment to be paid by means of letters of credit issued by Plaintiff, Espirito Santo Bank. Anastasios Kyriakides, chairman of the vessel's owner, ANK Marine Enterprises, Inc., contacted Espirito Santo to obtain the credit arrangement required by the Sea Venture Cruises-Precetti Agreement. Kyriakides had authority to make arrangements with Espirito Santo for the letters of credit. The specific purpose of the letters of credit to Precetti was to effect payments for materials, equipment, labor, and materials pertaining to galleys and galley equipment manufactured for and installed in the vessel. Before advancing funds, Espirito Santo received the documents described in and required by the letters of credit which confirmed Precetti's work consisting of furnishing and installing the galleys and galley equipment aboard the M/V Tropicana.

Espirito Santo Bank has not been repaid for advances made pursuant to the letter of credit totalling $988,888. On February 6, 1989, Sea Venture Cruises, Inc., executed a Term Note in the amount of $988,888 reconfirming the principal balance of the letter of credit. Although principal has not been reduced, interest was paid through August 26, 1989.

Defendant also executed a Revolving Credit Note with Plaintiff Espirito Santo Bank in the amount of $100,000. In connection with said note, Sea Venture Cruises, Inc. executed a revolving Credit Agreement used to pay for necessary services and supplies furnished to M/V Tropicana. Espirito Santo funded all such payments in Miami, Florida. Payments made pursuant to the revolving line of credit included: payment of the vessel's expenses and stevedore, expenses for passenger services, lodging for crew members, and expenses in connection with vessel-related insurance. In addition, Sea Venture Cruises, Inc. exchanged a $56,000 check payable to Espirito Santo for cash to pay crew members' and other personnel's wages. Espirito Santo Bank has not been reimbursed for advances pursuant to the line of credit. Although principal has not been reduced, interest was paid through August 26, 1989.

Guiness [sic] Mahon & Co. has asserted a claim to the Defendant property pursuant to Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims. Guiness Mahon & Co. ("Claimant") claims that it was the mortgagee in possession of the M/V Tropicana from approximately September 1, 1989 until October 17, 1989. In order to avoid the arrest of the Defendant vessel, Claimant substituted security for the vessel and now seeks restitution and the right to defend.

II. *Motion for Summary Judgment*

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

It may be entered only where there is *no* genuine issue of material fact. Moreover, the moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In applying this standard, the Eleventh Circuit recently explained:

> In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608; *Marsh*, 651 F.2d at 991. All reasonable doubts about the facts should be resolved in favor of the nonmovant. *Casey Enterprises v. Am. Hardware Mutual Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial.

> *Marsh*, 651 F.2d at 991; *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co.*, 420 F.2d at 1213. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Impossible Electronics*, 669 F.2d at 1031; *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970).
>
> Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. at 160, 90 S.Ct. at 1609-10; *Marsh*, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). *See Dalke v. Upjohn Co.*, 555 F.2d 245, 248-49 (9th Cir. 1977).

Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982); *see also Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1513 (1986).

The United States Supreme Court has recently provided significant additional guidance as to the evidentiary standard which trial courts should apply in ruling on a motion for summary judgment:

> [The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. South-*

> *ern R. Co.*, 320 U.S. 476, 479-80, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943).

Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986). The Court in *Anderson* further stated that "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 2512. In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. *Id.* at 2513. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. *Id.*

In another recent case, the Supreme Court has declared that a non-moving party's failure to prove an essential element of a claim renders all factual disputes as to that claim immaterial and requires the granting of summary judgment:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will *bear* the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (emphasis added).

In the instant case, Plaintiff argues that the facts are undisputed and that it has satisfied all the requirements for enforc-

ing a maritime lien against Defendant vessel. Claimant, on the other hand, did not object to Plaintiff's Statement of Undisputed Material Facts until after three months had elapsed from the time the Statement was filed. In addition, after three months of the filing of the motion for Final Summary Judgment, Claimant has recently asserted that Greek law is controlling and has submitted an opinion by Greek counsel on Plaintiff's lack of right to a maritime lien on the basis of Greek law. We believe that we would be well justified in refusing to consider Claimant's exceedingly untimely submissions and in granting Plaintiff's Motion for Summary Judgment solely on the basis of the previously filed materials. Claimant has flagrantly disregarded the time limitations imposed by the Court pursuant to the Local Rules and the Federal Rules of Civil Procedure. Nonetheless, we will proceed to consider Claimant's submissions on their merits.

Even upon consideration of Claimant's untimely objections, Claimant does not squarely dispute any material fact, as presented by Plaintiff, nor does Claimant bring to the attention of this Court any relevant factual issues which need to be resolved at trial. Indeed, we find no genuine dispute of material fact which would preclude entry of summary judgment.

The central issue presented by the parties here concerns whether Plaintiff's claims constitute a maritime lien against the Defendant vessel. Claimant argues that a letter of credit may not form the basis for a claim of a maritime lien. Claimant contends that Plaintiff bank is an unsecured creditor attempting to convert its claims into secured claims by asserting maritime liens. In addition, Claimant maintains that Greek law governs the determination of a maritime lien and that Greek law does not recognize the lien claimed by Plaintiff.

To begin, we are satisfied that application of the law of the United States is appropriate in the instant case. The Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) has set out a series of factors to be considered in maritime conflict of law problems, that being: the place of the wrongful act; the law of the flag; the allegiance

or domicile of the injured; the allegiance of the defendant shipowner; the place of contract; the inaccessibility of a foreign forum; and the law of the forum. *Lauritzen* involved an action to recover tort damages under the Jones Act. Subsequently, in the context of maritime law, courts have held that the factors listed in *Lauritzen* are not exhaustive and have considered general choice of law doctrines. *Gulf Trading & Transportation Co. v. M/V Tento*, 694 F.2d 1191 (9th Cir. 1982) ("the place where supplies are furnished as the predominant source of governing law would be unwise in the maritime context."); *Gulf Trading & Transportation Co. v. Vessel Hoegh Shield*, 658 F.2d 363 (5th Cir., Unit A 1981) *cert. denied* 457 U.S. 1119, 102 S.Ct. 2932 (1982). In that respect, the Restatement (Second) of Conflicts of Law § 6 (1971) sets forth principles to be applied in choice of law matters. The relevant factors include:

> the needs of the international system; relevant policies of the forum; relevant policies of other interested states; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied.

R.2d., Conflicts of Law § 6 (1971). Moreover, in *Gulf Trading & Transportation Co. v. M/V Tento*, *supra*, the court held that:

> choice of law questions involving maritime liens are to be resolved by weighing and evaluating the points of contact between the transaction and the sovereign legal systems touched and affected by it. This is not to say that multiple contacts are used merely as a device to determine which sovereign has the most compelling governmental interest in a transaction. The interests of competing sovereigns may be taken into account without rejecting altogether the contacts the bar and the maritime industry are accustomed to weigh in making the initial determination of governing law. (citations omitted).

Gulf Trading & Transportation v. M/V Tento, 694 F.2d at 1195.

In the instant case, Plaintiff is located and incorporated in the state of Florida; the transaction forming the basis of the maritime lien was negotiated in Florida; the final contract was executed in Florida; performance, in accordance with the terms of the credit agreements, was to take place in Florida; and the funds advanced were for the purpose of transforming the vessel into a one-day cruise-ship to operate out of Miami, Florida. In addition, we note that the primary concern of the Federal Maritime Lien Act is the protection of American suppliers of goods and services. *Tramp Oil and Marine, Ltd. v. M/V "Mermaid I"*, 805 F.2d 42, 46 (1st Cir. 1986). Although the underlying repairs, for which the Plaintiff's funds were advanced, were alleged to have been performed in Greece, in our view, the governmental interest of Greece in having its laws, concerning maritime liens, applied as to an American provider of necessaries upon the order of a Panamanian charterer and its American agent for a vessel sailing under a Bahamian flag is minimal at best. Consequently, on the basis of the foregoing factors, we turn to an analysis of Federal maritime law.

Title 46, U.S.C. § 31342 provides:

> A person providing necessaries to a vessel (except a public vessel) on the order of a person listed in section 31341 of this title[1] or a person authorized by the owner—

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1 46 U.S.C. § 31341:

(a) The following persons are presumed to have authority to procure necessaries for a vessel:

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by—

(A) the owner;

(B) a charterer;

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

On the subject of funds advanced for the purpose of acquiring or obtaining marine necessaries, the Courts have held that they also give rise to maritime liens. *Crustacean Transportation Corp. v. Atalanta Trading Corp.*, 369 F.2d 656 (5th Cir. 1966); *Universal Shipping v. Panamanian Flag Barge*, 563 F.2d 483 (1st Cir. 1976) ("we believe it follows that an advance that is made with the purpose of permitting the vessel to purchase supplies and other necessaries must also give rise to a maritime lien.") The former Fifth Circuit has expounded:

> Appellant asserts that advancing money to Hackman for the prospective purchase of "repairs, supplies, and other necessaries" cannot create a maritime lien. Conceding that one who advances money to discharge maritime liens inherits the rank of the lien discharged (Black and Gilmore, The Law on Admiralty, p. 519), nevertheless, appellant points out that here money was advanced prior to the existence of any lien. Therefore, says appellant, Atalanta obtained no lien for which it could subrogate upon payment for repairs, supplies, etc, by Hackman, because Hackman, as the vessel's owner, could not create a lien upon the vessel.
>
> We disagree. We think this Court settled the question in *Pavlis v. Jackson*, 131 F.2d 362 (1942), cert. den. 318 U.S. 769, 63 S.Ct. 761, 87 L.Ed. 1140. In *Pavlis*, monies were advanced prior to the voyage to pay the wages of the crew aboard a fishing vessel. It was there held

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(C) an owner pro hac vice; or

(D) an agreed buyer in possession of the vessel.

(b) A person tortiously or unlawfully in possession or charge of a vessel has no authority to procure necessaries for the vessel.

> that furnishing money to the master in good faith to obtain repairs or supplies in order to forward a voyage of the vessel raises a lien just as though the things money was secured to pay for had been furnished by the lender.

Crustacean Transportation Corp. v. Atalanta Trading Corp., 369 F.2d at 659-60.

Consequently, in our view, Plaintiff's extension of credit used to obtain undisputed, marine necessaries creates a maritime lien over Defendant vessel. The undisputed facts show that Plaintiff provided the Defendant vessel with advances in the form of letters of credit and a line of credit for the express purpose of permitting Defendant vessel to obtain equipment, repairs, and supplies. It has not been disputed by Claimants, and we do not doubt, that Defendant's underlying expenses fall within the definition of "necessaries" pursuant to 46 U.S.C. § 31342. *See Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986) ("The term 'necessary' under the Federal Maritime Lien Act includes most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function. Necessaries are the things that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged. These things may be money, labor, and skill, and personal services as well as materials. What is necessary is to be determined relative to the requirements of the ship. 2 Benedict on Admiralty § 37 at 3-28."). Moreover, the Fifth Circuit in *Equilease* noted that one of the purposes of the Federal Maritime Lien Act was to eliminate the previously existing distinctions drawn between rights to liens on a vessel in her home port and a vessel in a foreign port: "with the creation of the federal maritime lien, a single federal statute is substituted for the state statutes insofar as they confer liens for repairs, supplies and other necessaries, and the old geographical distinctions are gone." 793 F.2d at 603. Furthermore, we note that Claimant has made no showing that Plaintiff applied only on the personal credit of the owner and not on the credit of the ship in connection with advances

made to and on behalf of the vessel. *See Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1209 ("The Federal Maritime Lien Act explicitly instructs us to presume that those who furnish repairs, supplies, and other necessaries looked to the credit of the vessel itself and not just to the owner, and in this circuit the presumption is very strong.")

Additionally, Claimant, Guiness Mahon & Co. Ltd., contends that even if it is found that Plaintiff is entitled a maritime lien, Defendant's preferred ship's mortgage enjoys priority. We disagree. It is firmly established that a foreign preferred ship mortgage is outranked by any maritime lien for repairs or other necessaries performed or supplied in the United States. *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204, 1210-11 (1978); *Thorsteinsson v. M/V Drangur*, 891 F.2d 1547 (11th Cir. 1990); *see* 46 U.S.C. §.31326.[2] It is undisputed that the funds provided by the Plaintiff, giving rise to a maritime lien, originated and were advanced in the United States. Consequently, Plaintiff's maritime lien has priority over Claimant's preferred mortgage lien. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment as to Counts I and II of its Complaint is GRANTED. Plaintiff is entitled to judgment based on a maritime lien against Defendant vessel in the sum of

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2 46 U.S.C. § 31326

(a) When a vessel is sold by order of a district court in a civil action in rem brought to enforce a preferred mortgage lien or a maritime lien, any claim in the vessel existing on the date of sale is terminated, including a possessory common law lien of which a person is deprived under section 31325(e)(2) of this title, and the vessel is sold free of all those claims.

(b) Each of the claims terminated under subsection (a) of this section attaches, in the same amount and in accordance with their priorities to the proceeds of the sale, except that—

(1) the preferred mortgage lien has priority over all claims against the vessel (except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens); and

(2) for a foreign vessel, the preferred mortgage lien is subordinate to a maritime lien for necessaries provided in the United States.

$1,088,888.00. And Plaintiff is directed to submit a Final Order for our signature within ten (10) days of this order.

DONE AND ORDERED at Miami, Florida, this 29th day of May 1990.

/s/ STANLEY MARCUS

STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

Federal Maritime Lien Act, 46 U.S.C. §§ 31341-31343 (1988 & Supp. I 1989)

§ 31341. Persons presumed to have authority to procure necessaries

(a) The following persons are presumed to have authority to procure necessaries for a vessel:

(1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by—

(A) the owner;

(B) a charterer;

(C) an owner pro hac vice; or

(D) an agreed buyer in possession of the vessel.

(b) A person tortiously or unlawfully in possession or charge of a vessel has no authority to procure necessaries for the vessel.

§ 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

§ 31343. Recording and discharging liens on preferred mortgage vessels

(a) Except as provided under subsection (d) of this section, a person claiming a lien on a vessel covered by a preferred mortgage filed or recorded under this chapter may record with the Secretary of Transportation a notice of that person's lien claim on the vessel. To be recordable, the notice must—

(1) state the nature of the lien;

(2) state the date the lien was established;

(3) state the amount of the lien;

(4) state the name and address of the person; and

(5) be signed and acknowledged.

(b) The Secretary shall record a notice complying with subsection (a) of this section.

(c) On full and final discharge of the indebtedness that is the basis for a claim recorded under subsection (b) of this section, on request of the Secretary or owner, the person having the claim shall provide the Secretary with an acknowledged certificate of discharge of the indebtedness. The Secretary shall record the certificate.

(d) A person claiming a lien on a vessel covered by a preferred mortgage under section 31322(d) of this title must record and discharge the lien as provided by the law of the State in which the vessel is titled.

Federal Maritime Lien Act, 46 U.S.C. §§ 971-975 (1982)

§ 971. Persons entitled to lien

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

§ 972. Persons authorized to procure repairs, supplies, and necessaries

The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

§ 973. Notice to person furnishing repairs, supplies, and necessaries

The officers and agents of a vessel specified in section 972 of this title shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel.

§ 974. Waiver of right to lien

Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise; and this chapter shall not be con-

strued to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.

§ 975. State statutes superseded

This chapter shall supersede the provisions of all State statutes conferring liens on vessels, insofar as such statutes purport to create rights of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessaries.